

SERVICE DATE – LATE RELEASE AUGUST 30, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 55 (Sub-No. 779X)

CSX TRANSPORTATION, INC.—ABANDONMENT EXEMPTION—
IN TRUMBULL COUNTY, OHIO

Decided: August 30, 2018

CSX Transportation, Inc. (CSXT) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 13.9 miles of rail line on its Newton Falls Subdivision, between milepost BGA 86.1 and milepost BGA 100.00, in Trumbull County, Ohio (the Line). Notice of the exemption was served and published in the Federal Register on May 30, 2018 (83 Fed. Reg. 24,837). The effective date of the notice was automatically stayed until July 9, 2018, by the filing of a notice of intent to file an offer of financial assistance (OFA) by BDM Warren Steel Holdings, LLC (BDM).¹ See 49 C.F.R. § 1152.27(c)(2). The deadline for filing an OFA was not affected and remained June 29, 2018 (30 days from the publication of the notice of exemption). See 49 C.F.R. § 1152.27(b)(2)(ii).

By decision and notice of interim trail use or abandonment (NITU) served on July 6, 2018, the proceeding was reopened and a 180-day period was authorized for the Trumbull County Commissioners (County) to negotiate an interim trail use/rail banking agreement with CSXT for the Line pursuant to § 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. The decision also imposed a public use condition under 49 U.S.C. § 10905 for a period of 180 days.² The July 6 decision noted that BDM neither filed an OFA by the June 29, 2018 deadline, nor filed a petition to toll the deadline for submitting an OFA, as permitted by 49 C.F.R. § 1152.27(c)(2)(ii)(C).

On July 10, 2018, BDM late-filed its OFA. BDM asserts that CSXT did not provide the OFA-related information it requested in June, but that BDM nevertheless is prepared to make an offer. The OFA contains BDM's offer of a purchase price with associated terms and conditions of a sale. BDM also states that it has provided banking information demonstrating financial responsibility.

¹ The City of Newton Falls, Ohio, also filed a notice of intent to file an OFA. However, on June 21, 2018, in this proceeding, the City's notice of intent was rejected for failing to comply with the requirements at 49 C.F.R. § 1152.27(c)(2)(i).

² The July 6 decision also imposed environmental conditions and a historic preservation condition.

On the same day, the Youngstown/Warren Regional Chamber (YWRC) submitted a letter requesting additional time for BDM to file its OFA and stating its support for preservation of rail service on the Line. On July 12, 2018, the Mahoning Valley Economic Development Corporation (MVEDC) submitted a letter also requesting additional time for BDM to file its OFA and supporting preservation of rail service for the economic value it brings to the region.

On July 23, 2018, CSXT filed a motion to reject BDM's OFA as late-filed and incomplete. In response to BDM's claim that CSXT failed to provide financial information necessary to make its OFA, CSXT states that BDM did not inquire about the information until July 7, the day after the Board's July 6 decision. CSXT argues that, in any event, the OFA does not comply with the requirements under 49 C.F.R. § 1152.27(c)(1)(iv), in that it does not include proof that 10% of the proposed purchase price has been placed in escrow, evidence of a continued need for rail service, or certain required information about BDM. (Mot. 5.). Finally, CSXT argues, in the alternative, that if the OFA is treated as an appeal of the July 6 decision, the appeal should be denied.

On August 17, 2018, Team NEO submitted a letter supporting BDM's efforts to use the Line for industrial and recreational purposes.

DISCUSSION AND CONCLUSIONS

Under 49 C.F.R. § 1152.27(c)(1)(iv), to submit a formal OFA, an offeror must comply with the Board's requirements for the contents of an offer. See 49 C.F.R. § 1152.27(c)(2)(iii). Once submitted, an OFA is reviewed by the Director of the Office of Proceedings to determine whether the offer satisfies the standards of 49 U.S.C. § 10904(d) and the Board's regulations. 49 C.F.R. § 1011.7(a)(2)(ii). Here, the offer's deficiencies, as described below, demonstrate that it does not satisfy the Board's requirements.³ Therefore, the OFA will be rejected.

Under § 1152.27(c)(1)(iv)(B) and (D), an offeror must demonstrate not only that it is financially responsible, but also that it has placed in escrow funds equaling 10% of the preliminary financial responsibility amount as determined under § 1152.27(c)(1)(ii). Here, BDM submitted with its notice of intent to file an offer a bank statement demonstrating that it met the preliminary financial responsibility amount calculated pursuant to § 1152.27(c)(1)(ii) – but it has

³ BDM's OFA, submitted on July 10, 2018, well after the June 29, 2018 regulatory deadline, was untimely because, although CSXT had not produced the information BDM had requested in June before BDM filed its OFA, BDM failed to request that the OFA deadline be tolled, as provided under 49 C.F.R. § 1152.27(c)(2)(ii)(C). Moreover, BDM filed its OFA on July 10, after the July 9, 2018, effective date of the exemption. Similarly, YWRC and MVEDC did not submit their requests for extensions of time for BDM to file an OFA until after the effective date of the exemption. Thus, the extension requests will be denied. But, as discussed, even if BDM's OFA were to be treated as timely, it fails to meet the Board's requirements for the contents of an offer, irrespective of any information needed from CSXT.

failed to demonstrate that it has placed the 10% of the preliminary financial responsibility amount in escrow, as required by § 1152.27(c)(1)(iv)(D).

Next, under § 1152.27(c)(1)(iv)(E), an offeror must demonstrate that there is a continued need for rail service on the line. BDM, however, has not done so. This abandonment exemption is for a line of railroad where there are no active shippers and there has been no service for over two years. BDM states that rail service is a “critical component of the redevelopment of the property and restoration of employment to the Warren area,” (OFA at third unnumbered page) but fails to describe which shippers or receivers on the Line require service or give any evidence of a commercial need. The letters of support from YWRC and MVEDC state that rail service is economically valuable but do not provide any evidence demonstrating a specific need for continued rail service on the Line. Nor does Team NEO point to any current need for continued rail service on the Line. When the Board updated the regulations for OFAs in Offers of Financial Assistance, EP 729 (STB served June 29, 2017), it stated that it would look at the “totality of the circumstances to determine whether there is a continued need for rail service on the line.” Offers of Financial Assistance, EP 729, slip op. at 15. Here, BDM and the regional organizations have not presented sufficient evidence of a continued need for rail service.

Finally, BDM failed to provide the basic contact information required of offerors under § 1152.27(c)(1)(iv)(F) and (G). The OFA states that BDM is the owner of the former RG Steel Plant in Warren, Ohio, but does not provide a mailing address or phone number. (OFA at third unnumbered page.) While CSXT asserts that BDM is a “mystery entity,” (Mot. 7) and has not identified its state of organization, the offer does state that it is an Ohio limited liability company. However, much of BDM’s contact information is missing and thus, this portion of the offer is also deficient.

Because of the deficiencies discussed above, BDM’s OFA will be rejected. The July 6 decision and NITU remain in effect.

It is ordered:

1. BDM’s offer of financial assistance is rejected.
2. YWRC and MVEDC’s requests for extensions of time are denied.
3. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.